

KEYWORD: Guideline D

DIGEST: To the extent that Applicant is challenging the Judge’s adverse conclusions about his credibility, we note that we are required to give deference to a Judge’s credibility determinations. Directive ¶ E3.1.32.1. The record supports the Judge’s findings about inconsistent statements by Applicant, which in and of themselves can undermine the credibility of his testimony. The totality of the Judge’s findings, and the record evidence upon which they are based—including the Judge’s finding about Applicant’s resemblance to the security photo of the suspect—support his adverse credibility determination. Adverse decision affirmed.

CASE NO: 19-02739.a1

DATE: 07/07/2021

DATE: July 7, 2021

_____)	
In Re:)	
)	
-----)	ISCR Case No. 19-02739
)	
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

James R. Klimaski, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 29, 2019, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline D (Sexual Behavior) and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 17, 2021, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Gregg A. Cervi denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge’s Findings of Fact

Applicant works for a Defense contractor. Previous to that, he served on active duty with the U.S. military. He holds degrees from a military academy and a military post graduate school. He holds a security clearance, which, for reasons set forth below, was suspended from 2006 until 2009. Married, he has three children.

In 2006, Applicant, who was on active duty at the time, was arrested at a U.S. airport for having surreptitiously videoed women at a baggage carousel by means of a camcorder placed beneath their dresses, a practice known as “upskirting.” Applicant initially denied the misconduct, although police noticed a videotape fall from Applicant’s pocket as he moved from his seat. After this discovery, Applicant confessed and admitted the misconduct as well to a previous incident from another airport. The evidence seized from Applicant showed the filming of five women. It also showed that his “upskirting” activity occurred at a shopping mall and possibly a military department store in addition to airports. Found guilty at trial, Applicant was sentenced to confinement for two years, suspended, with the charges dismissed after successful completion of probation.

Applicant denied that his misconduct was as extensive as the evidence appeared to show. The Judge noted that he had struggled to keep his wife from discovering his activities. In 2006, authorities suspended his security clearance, and the next year he was brought before a Board of Inquiry (BOI) to determine if he should be separated from the military. The BOI resulted in a favorable determination, retaining Applicant in the service. A staff psychiatrist at a military behavioral health clinic concluded that Applicant’s conduct was situational, a result of multiple stressors he had been experiencing at the time. She made no diagnosis. Applicant’s clearance was restored in 2009, though with a caution “that receipt of any derogatory information in the future, especially of a similar nature, will be cause for reconsideration of [Applicant’s] eligibility for a security clearance and/or special access.” Decision at 3.

In 2017, after his retirement from the military and while working for a Defense contractor, Applicant attended a sports tournament in which his daughter was playing. That same day, a

customer at a nearby department store reported that a man was filming underneath women's skirts with a cell phone placed inside a shopping basket. Store police personally observed the man place a basket under women, at one point actually attempting to pull a woman's skirt open to enhance the view. The store security camera recorded this activity, and police placed a close-up photo of the man on an online network seeking identification. "The photo shows a man that clearly resembles Applicant, wearing a shirt bearing the name of a small college located in another state . . . which Applicant's son attended." Decision at 4-5. As a result of the online request for information, at least 100 friends, associates, and coworkers contacted Applicant and his spouse and identified him as the man in the picture. During subsequent investigation, coworkers clearly identified Applicant as the suspect. However, criminal charges were dismissed as *nolle prosequi*, and Applicant is applying for expungement of the record.¹

Applicant denied committing the 2017 offense, insisting that his resemblance to the offender was coincidental. He made inconsistent statements about the extent of his counseling following the first incident, and he presented no counseling records into evidence at the hearing. Applicant sought treatment after the later incident, and his counselor testified that Applicant is a truthful person with no need for continued therapy. However, he did not disclose the details of any admissions Applicant may have made during his sessions. Applicant testified that his wife believes that he is the man in the store security photograph.

The Judge's Analysis

The Judge cited to Applicant's contention that he did not commit the 2017 offense. The Judge stated that Applicant has shown a practice of denying his offenses, both in 2006 and in the more recent one. He characterized Applicant's behavior as "reprehensible," and described Applicant's claims of innocence as "absurd." Decision at 9. He noted that Applicant had resumed his criminal activity despite having undergone counseling. He stated that Applicant's having declined to authorize his counselor to disclose the contents of his counseling sessions precluded the Judge from drawing reasonable conclusions regarding Applicant's success in treatment. The Judge stated that Applicant had not demonstrated that he followed a legitimate treatment plan and that his behavior is under control. He stated that there can be no successful rehabilitative efforts as long as Applicant continues to deny his culpability.

Discussion

Applicant's brief cites to matters from outside the record, which we cannot consider. Directive ¶ E3.1.29. He cites to the testimony of his counselor that he is truthful and that he did not appear to be hiding anything during treatment. He notes the requirement of Directive, Encl. 2, App. A ¶ 2(f)(2) that security officials should consider the extent to which an applicant has been truthful

¹An incident report reflects that Applicant's cell phones contained security software that prevented examination of their contents. Government Exhibit (GE) 10 at 10.

and complete in responding to questions. He argues that he was truthful in responding to questions about his past behavior.

Applicant's claims of truthfulness during a proceeding in which he denied having committed the 2017 offense could impliedly constitute an assertion that the Judge's findings on this matter were in error. We have examined the record evidence as a whole, including GE 10, the police report that describes the offense and its subsequent investigation, and GE 11, the photo of the offender posted online and that the Judge found clearly resembled Applicant. We have also considered Applicant's testimony that nearly 100 persons noticed that resemblance and that his wife believed that he was, in fact, the person represented in GE 11. Tr. at 87. We conclude that the Judge's material findings are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive ¶ E3.1.32.1.

Moreover, to the extent that Applicant is challenging the Judge's adverse conclusions about his credibility, we note that we are required to give deference to a Judge's credibility determinations. Directive ¶ E3.1.32.1. The record supports the Judge's findings about inconsistent statements by Applicant, which in and of themselves can undermine the credibility of his testimony. *See, e.g.*, ISCR Case No. 15-03778 at 3 (App. Bd. Aug. 4, 2017). The totality of the Judge's findings, and the record evidence upon which they are based—including the Judge's finding about Applicant's resemblance to the security photo of the suspect—support his adverse credibility determination.

Applicant challenges the Judge's mitigation analysis. He cites to record evidence, including his educational attainments, his military career, and his excellent duty performance. He argues that his security-significant conduct is not recent and that he has taken steps to see that it does not recur. He also cites to his effort to have the most recent incident expunged from his records, which he contends reduces the likelihood that the incident will come to the attention of those who might try to coerce him into revealing classified information. He argues that he has met his burden of persuasion as to mitigation.

However, the presence of some mitigating evidence does not compel a favorable adjudication. To the contrary, a Judge must weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable or *vice versa*. A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the record, is not sufficient to demonstrate that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 18-00747 at 3 (App. Bd. Nov. 13, 2019). The arguments contained in Applicant's appeal brief are not sufficient to undermine the Judge's mitigation analysis. We note in particular the Judge's findings that Applicant committed his most recent offense after having had his clearance previously restored with a warning to avoid such misconduct in the future. These sustainable findings weigh heavily against Applicant's contentions on appeal. All in all, we find no reason to disturb the Judge's mitigation analysis. Moreover, despite Applicant's arguments, we conclude that the Judge's whole-person analysis complied with the requirement of the Directive in that he evaluated Applicant's case for mitigation in light of the totality of the evidence in the record. *See, e.g.*, ISCR Case No. 18-02925 at 3 (App. Bd. Jan. 15, 2020).

The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, “including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Judge’s adverse decision is sustainable on this record. “The general standard is that a clearance may be granted only when ‘clearly consistent with the interests of the national security.’” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). *See also* Directive, Encl. 2, App. A ¶ 2(b): “Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.”

Order

The Decision is **AFFIRMED**.

Signed: Michael Y. Ra’anan

Michael Y. Ra’anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Member, Appeal Board